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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LLOYD LAKE, Plaintiff and Respondent, v. LAMAR GRIFFIN et al., Defendants and Appellants.	D053583 (consolidated with D054311) (Super. Ct. No. 37-2007-0078637-CU-BC-CTL)

APPEAL from orders of the Superior Court of San Diego County, Joan M. Lewis, Judge. Affirmed in part and reversed in part with directions.

In October 2007, plaintiff and respondent Lloyd Lake (Plaintiff) brought a complaint against defendants and appellants Lamar Griffin, Denise Griffin and their son Reginald Bush, a renowned athlete (together Defendants), seeking recovery of monies on a common count theory (approximately $291,000). Plaintiff alleges that Defendants have become indebted to him, and to a general partnership of which he is a general partner ("New Era Sports" or New Era, a sports marketing company), for cash payments

advanced to Defendants for living expenses and other things, by Plaintiff and/or New Era, during the period while Bush was a college athlete.

These consolidated appeals arise out of the trial court's denial of Defendants' motion to compel arbitration, and the related award of attorney fees to Plaintiff. (Code Civ. Proc.,[1] § 1281.2; Civ. Code, § 1717.) The trial court determined that Plaintiff was not bound by the arbitration clause relied upon by Defendants, which appears in an April 2007 settlement agreement reached between Defendants and a third party, Michael Michaels (Michaels) (the settlement agreement).[2] The settlement agreement discloses that Michaels, either individually or on behalf of the same alleged general partnership New Era, had also advanced monies to Defendants over a period of time, in particular, lease payments for a house purchased on their behalf, and "other alleged transactions." In the settlement agreement, Michaels represented that he was resolving and releasing all claims regarding the lease agreement and those "other alleged transactions," *on behalf of himself and his partners, partnerships, agents, or others*, with respect to the dispute, in return for undisclosed payments by Defendants.

In this appeal, Plaintiff and Defendants are disputing whether Michaels had the ability to reach a binding settlement with Defendants of all the claims subsequently pled by Plaintiff in this complaint, in light of the previously existing partnership and/or

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1 All further statutory references are to the Code of Civil Procedure unless otherwise noted.

2 That settlement agreement contains an arbitration clause stating that "any dispute, claim or controversy arising out of or relating to this Agreement . . . including the scope or applicability of this agreement to arbitrate, shall be determined by confidential, binding arbitration . . . ."

principal/agent relationship between Plaintiff and Michaels, with respect to their own or New Era's activities. According to Defendants, when Michaels settled all his claims, Plaintiff then became bound by the arbitration clause in the settlement agreement, with respect to any claims he could allege as a partner or agent of Michaels or New Era. (*Keller Constr. Co. v. Kashani* (1990) 220 Cal.App.3d 222 (*Keller*).)

Our review of this record leads us to conclude that for purposes of supporting their motion to compel arbitration, Defendants have failed to carry their burden of proof of establishing that the arbitration clause in the settlement agreement suffices to bind Plaintiff, such that he would have been required to arbitrate all the various claims he has pled in his complaint (some of which do not reference New Era or Michaels). Instead, on the current state of the record, Plaintiff's complaint is fairly susceptible of a reading that it alleges numerous, predominantly different claims from those that Michaels referred to in the settlement agreement as subject to his sole authority to settle on behalf of himself, his agents, or the partnership New Era. We do not reach the merits of any applicability of the settlement agreement as a whole to the New Era claims, and decide here only that the trial court correctly denied Defendants' motion to compel arbitration.

To explain our reasoning, we will first set forth applicable standards for evaluating motions to compel arbitration in a partnership context, and apply them to this record. We will then turn to the appeal of the order awarding attorney fees. As will be explained, we further conclude the trial court erred when it made the award of contractual attorney fees on the basis that Plaintiff was the "prevailing party" for purposes of the motion to compel arbitration pursuant to the settlement agreement. The facts brought out in the motion

proceedings demonstrated that further issues may exist regarding the interpretation of the settlement agreement and its preclusive effect, if any, upon Plaintiff's claims, if they are based in partnership business. (See *Otay River Constructors v. San Diego Expressway* (2008) 158 Cal.App.4th 796 (*Otay*).) At this time, it cannot conclusively be determined whether Plaintiff is the prevailing party with regard to the settlement agreement, of which the arbitration clause is an integral part. (Civ. Code, § 1717.)

We accordingly affirm the order denying the petition to compel arbitration, but reverse the order awarding attorney fees with directions to enter a different order denying such fees, and specifying that the new fees order is made without prejudice to a further determination of prevailing party status at an appropriate time.

DISCUSSION

We first address the contract interpretation issues presented, including the applicability and scope of the arbitration provision within the settlement agreement, compared to the allegations of the complaint. Although the arguments in the briefs are very wide ranging, our main inquiry must be whether the New Era partnership business allegations that are the subject of the complaint and the settlement agreement are materially identical, for purposes of assessing the binding effect of the arbitration clause. We will then turn to the contentions regarding the order awarding attorney fees.

I

INTRODUCTION

A. Arbitration Standards

Defendants' motion for an order compelling arbitration was brought under section 1281.2, alleging the existence of a written agreement to arbitrate a controversy and the refusal of a party to arbitrate. The trial court was thus required to determine whether an agreement to arbitrate the controversy exists and covers this dispute. "[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. Because the existence of the agreement is a statutory prerequisite to granting the petition, the petitioner bears the burden of proving its existence by a preponderance of the evidence. If the party opposing the petition raises a defense to enforcement . . . that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense." (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*).)

To evaluate this record, we are required to apply rules for contract interpretation not only in the arbitration context, but also with respect to the settlement agreement that contained the arbitration clause. We are mindful of the " 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' " (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9; *Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 433 (*Hall*).) However, it is essential to the proper operation of that

policy that " ' "[t]he scope of arbitration is . . . a matter of agreement between the parties' [citation], and '[t]he powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission.' " ' [Citations.]" (*Ibid.*; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 706; see *Keller, supra,* 220 Cal.App.3d 222, 229.)

In this case, the court had before it the settlement agreement that Defendants reached with Michaels, and its dispute resolution clause. In *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793 (*Weddington*), contract principles as applied to settlement agreements are analyzed: "[T]he legal principles which apply to contracts generally apply to settlement contracts. [Citation.] An essential element of any contract is 'consent.' [Citations.] The 'consent' must be 'mutual.' [Citations.]" (*Id.* at pp. 810-811.) " 'The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' [Citation.] Outward manifestations thus govern the finding of mutual consent required by Civil Code sections 1550, 1565 and 1580 for contract formation. [Citation.] The parties' outward manifestations must show that the parties all agreed 'upon the same thing in the same sense.' (Civ. Code, § 1580.) If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation. [Citations.]" (*Weddington, supra,* 60 Cal.App.4th at p. 811.)

However, "[t]here are occasions in which 'minor matters' in elaborate contracts are left for future agreement. When this occurs, it does not necessarily mean that the entire

contract is unenforceable." (*Weddington, supra*, 60 Cal.App.4th 793, 813.) Here, the threshold issue for determining the applicability of this arbitration clause is an analysis of the alleged power of Michaels, as an individual and as a general partner of New Era, to reach a settlement that bound other alleged New Era representatives, such as Plaintiff (as a general partner or agent). Those issues require some understanding of the alleged factual nature of the partnership business of New Era, as understood by its principals and agents, and persons dealing with the partnership.

B. Standards of Review

"According to *Rosenthal*, facts relevant to enforcement of the arbitration agreement must be determined ' "in the manner . . . provided by law for the . . . hearing of motions." ' [Citation.] This 'ordinarily mean[s] the facts are to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion.' [Citations.]" (*Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 761-762 (*Hotels Nevada*), citing *Rosenthal, supra*, 14 Cal.4th at pp. 413-414; *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 [in resolving a petition to compel arbitration, "[t]he trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination"].)

"Where the trial court's decision on arbitrability is based upon resolution of disputed facts, we review the decision for substantial evidence. [Citation.] In such a case we must ' "accept the trial court's resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every

permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence." ' [Citation.]" (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

Defendants contend that a pure de novo standard of review is appropriate for construing the arbitration clause. Where the trial court determined pure questions of law, such as the identity of parties to an arbitration agreement or whether the arbitration covered certain alleged claims, an appellate court reviews such determinations de novo. (*Smith v. Microskills San Diego L.P.* (2007) 153 Cal.App.4th 892, 896 (*Smith*).) A " 'determination of standing to arbitrate as a party to the contractual arbitration agreement is a question of law for the trial court in the first instance. [Citation.]' " (*Id*. at p. 900.) However, this case is not that simple. Generally, "a nonsignatory to an agreement cannot be compelled to arbitrate and cannot invoke an agreement to arbitrate, without being a party to the arbitration agreement. " (*Id*. at p. 896.) There are exceptions relied on by Defendants here:

> " 'A nonsignatory to an agreement to arbitrate may be required to arbitrate, and may invoke arbitration against a party, if a preexisting confidential relationship, *such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory*. [Citation.]' " (*Smith, supra*, 153 Cal.App.4th 892, 896-897, italics added.)

A classic example of a nonsignatory who is held to be bound by an arbitration clause is found in the health care context: "[W]here a patient has signed an arbitration agreement with a health care provider, the patient's spouse and heirs have been bound by the arbitration clause in actions growing out of the health care provider's treatment of the

patient." (*Smith, supra*, 153 Cal.App.4th at pp. 896-897; see *Keller, supra*, 220 Cal.App.3d 222, 228 ["in varying circumstances, California courts have repeatedly enforced arbitration agreements against and in favor of persons who never agreed to arbitrate the dispute"].)[3] The courts will inquire whether there is any equitable reason to give a nonsignatory the benefit, or burden, of the arbitration clause in a separate agreement. (*Smith, supra*, at p. 897; see *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 239 ["an agreement to arbitrate between a plaintiff-patient and a defendant-health care provider does not bind a cross-complainant who was not a party to the agreement and who now seeks equitable indemnity from the health care provider"].)

Here, both the moving and opposing sets of papers filed in connection with the motion to compel arbitration contained declarations and exhibits, including discovery responses of the parties. These materials were offered by the parties to assist the trial court in evaluating the face of the settlement agreement, for determining its scope and any binding effect it would have upon an unnamed third party such as Plaintiff, regarding arbitration. Because the trial court was presented with these factual materials, and interpreted them in ruling on the motion, Defendants are incorrect that the settlement and arbitration agreements can be interpreted in isolation. Moreover, it makes no difference

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3 Apparently due to a split of authority about a patient's ability to bind both a spouse and/or adult children to a health care arbitration agreement, the California Supreme Court has granted review in an arbitration case involving a nonsignatory to a health care arbitration clause. (*Ruiz v. Podolsky*, review granted Oct. 14, 2009, S175204.)

that no oral testimony was presented at the hearing, in light of the presence of other conflicting documentary evidence.

Accordingly, the arbitration issues presented on appeal must be decided on the record presented, which includes not only the settlement agreement, but also the pleadings and discovery materials provided in the motion proceedings. Obviously, many of these transactions were related in some fashion, but it is unclear to what extent. (Civ. Code, § 1642 [contracts relating to the same matters between the same parties that are part of substantially one transaction are to be construed in light of each other]; Civ. Code, § 1647 [contracts may be explained by reference to the surrounding circumstances].)

Even where the pertinent facts are essentially undisputed, resolving a legal question arising from those facts will, in some cases, require "the drawing of inferences from the presented facts." (*Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700-701 (*Saathoff*).) In such a case, more than a pure question of law is presented, and the substantial evidence test requires the reviewing court to give deference to the inferences in support of a trial court finding. (*Ibid*.)

In light of these principles, the challenged order denying the petition to compel arbitration should be analyzed for any substantial evidence support, regarding the applicability of the arbitration clause to this complaint. (*Hotels Nevada*, *supra*, 144 Cal.App.4th 754, 761-762, citing *Rosenthal*, *supra*, 14 Cal.4th at pp. 413-414.) The documents cannot be read in a vacuum, but rather are to be considered together in context of the entire dispute placed before the trial court.

II

MOTION TO COMPEL ARBITRATION: STATE OF THE RECORD

A. Comparison of Documents: Michaels' Settlement and Plaintiff's Complaint

In April 2007, Defendants settled a dispute with Michaels over Michaels' claim he was owed reimbursement of payments he made for them on a house that he leased for them. The written settlement agreement parties were two of the Defendants, Lamar Griffin and Denise Griffin, on the one hand, and Michaels (apparently individually). Appellant Bush is expressly identified as an intended third party beneficiary of the settlement agreement. There is no express mention of Plaintiff Lake in the agreement. (But see *Zakarian v. Bekov* (2002) 98 Cal.App.4th 316, 323 [where a party to arbitration agreement agrees to a term allowing joinder of a nonobjecting third party, the party may not resist arbitration on the ground that the third party did not sign the agreement].)

The settlement agreement in our case identifies the controversy that was being settled as related to the lease agreement "and other alleged transactions" ("the Dispute"). Michaels agreed to release himself and each of his employers, employees, associates, partners, partnerships, business entities, agents, "and/or any other person or entity acting in concert with him, at his direction or on his behalf," for claims related to the above defined Dispute. Defendants Griffin likewise released their claims and made a payment to Michaels of an undisclosed amount.

The settlement agreement contains an arbitration and dispute resolution provision, under which the parties agreed that any disputes arising out of or relating to the agreement or its interpretation or enforcement, "including the determination of the scope

or applicability of" of the arbitration clause, would go to arbitration. This clause gave the arbitrator the authority to award attorney fees incurred in arbitration. The settlement agreement further contained another attorney fees clause in favor of a party to the agreement who had successfully pursued any action to enforce the releases granted in the agreement.

In October 2007, this action began when Plaintiff sued Defendants (Griffins and Bush), on common counts to recover monies paid to Defendants and/or their "Bush partnership," which Defendants had allegedly formed for the purpose of soliciting the assistance of Lake, Michaels, and/or New Era. The complaint alleged that Plaintiff was an individual and a general partner of New Era, and New Era was pled to be either a general partnership or a joint venture. Plaintiff alleges that Defendants, individually and on behalf of the Bush partnership, had become indebted to Plaintiff and to New Era for monies had and received between November 2004 and January 2006. The monies were used for work, services, goods, a vehicle, and "shelter." Other monies were paid at the request of Defendants.[4]

According to Plaintiff's complaint, Defendants promised to repay the money to Plaintiff and New Era, and also promised they would only receive money from Plaintiff

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4 There are some restrictions on a college athlete's professional relationship and receipt of monies from sports agents, but the record does not reveal that those issues are being addressed here. (Bus. & Prof. Code, § 18895 et seq.; see 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 449, pp. 548-549 ["The Miller-Ayala Athlete Agents Act regulates the contracts and business operations of agents representing both professional and student athletes and imposes civil and criminal penalties for violations of its provisions"].)

and New Era, unless they gave advance notification to Plaintiff that someone else would be lending them money. However, Plaintiff alleges that at some time in late October 2005, an unidentified third party paid some expenses for Defendants, and that this circumstance was concealed by Defendants from Plaintiff and New Era. Plaintiff and New Era did not learn of those "misrepresentations" (Defendants' receipt of other monies) until March 2006. Plaintiff alleged that he has sustained damages of at least $291,600, "individually and on behalf of New Era."

Other than reciting that Defendants had "solicited the assistance" of Lake, Michaels, and/or New Era, the complaint does not clarify which of those parties paid which monies to Defendants, including for "shelter." The caption of Plaintiff's complaint does not name New Era or Michaels as a party, nor does the complaint plead that Michaels is entitled to any reimbursement. The record does not include any answer filed by Defendants to the complaint, but they participated in discovery for over six months after it was filed.

B. Evidence Submitted in Motion to Compel Arbitration and Opposition

After Plaintiff filed his complaint, Defendants brought their motion to compel arbitration, based on the settlement agreement's arbitration provision. In support of their motion, Defendants relied on the discovery responses of Plaintiff, to the effect that Plaintiff acknowledged that he was not only a general partner of New Era, but also an agent of Michaels at the time of the transactions or "incident." Plaintiff's responses identified New Era as both a general partnership and/or a joint venture, and Plaintiff stated he was self-employed.

Plaintiff's discovery responses, authenticated by Defendants' attorney's declaration, listed numerous cash payments made by him and/or Michaels on each others' behalf or individually, or for the partnership, for several thousand dollars per month during a period of about a year. Plaintiff also claimed that he and Michaels and the partnership made these payments in reliance on Defendants' promises to repay them.

In support of their motion, Defendants attached several redacted versions of the settlement agreement. It recites that Michaels had not promptly provided Defendants with a copy of the disputed lease, but had now done so. Defendants have not disclosed to Plaintiff or to the court the amounts of settlement funds they paid to Michaels.

In response to the motion to compel arbitration, Plaintiff filed his opposition with evidence opposing Defendants' assertions. Plaintiff asserted that his claims against Defendants involved payment of over $291,000 to fund their living expenses and "lavish lifestyles."

Other evidence submitted with Plaintiff's opposition included Defendant Lamar Griffin's discovery responses, denying that he received money from New Era or Plaintiff. Plaintiff submitted his attorneys' declarations, stating that Defendants would not disclose the amount of the settlement that Michaels had reached with Defendants, and that other mediation efforts had taken place without Plaintiff being told that Michaels had settled any of his claims.

In Plaintiff's own declaration, he stated that he never authorized Michaels to settle any of his claims for money given to Defendants, and he was never told how much was the monetary amount of settlement. In late 2006, Michaels had hired a different attorney

to represent him because he did not want to be involved in a lawsuit. Plaintiff states that when he learned of the settlement reached by Michaels in 2007, he contacted Michaels, who told him the agreement was confidential but did not relate to Plaintiff's own claims. Plaintiff states that he has not benefited from Michaels' settlement with Defendants and believes that Defendants intended to "buy his silence and nothing more." Plaintiff filed requests that Defendants and Michaels appear to testify at the hearing on the arbitration motion.[5]

C. Preliminary Rulings on Discovery Issues; Denial of Motion to Compel Arbitration

At the same August 2008 hearings at which the motion to compel arbitration was being considered, the trial court was also required to resolve several discovery disputes. Although those orders are not directly challenged on appeal, the discovery problems should be mentioned here as they entered into the trial court's conclusions on the arbitration issues. First, in deciding the motion to compel arbitration, the court declined to entertain testimony at the time of the hearing, as Plaintiff had requested. The motion to compel arbitration was filed the day before court-ordered depositions of the parties were set to go forward on June 5, 2007.

Plaintiff brought motions to compel further responses from Defendants to his special interrogatories, but they were denied for failure to engage in an appropriate meet and confer process. Whether a stay on all discovery had applied while Defendants

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[5] The record does not show whether there is any independent or related litigation pending between Plaintiff and Michaels and/or New Era.

moved to compel arbitration was unclear, and the trial court concluded that Plaintiff believed there had been a stay in place that made the motions to compel timely filed. Both Plaintiff's and Defendants' requests for discovery sanctions were denied.

Ultimately, the motion to compel arbitration was denied "as there is no evidence before the court to demonstrate that the Plaintiff was a party to the arbitration agreement or otherwise subject to the agreement's terms."

Defendants appealed the order denying their motion to compel arbitration and the subsequent attorney fees award to Plaintiff of $24,570. The record does not show any stay on the other trial court proceedings was issued pending appeal.

III

ARBITRATION RULES IN LIGHT OF PARTNERSHIP PRINCIPLES

It is not disputed here that Plaintiff was not a party to the arbitration agreement. Our inquiry is whether the trial court correctly concluded Plaintiff "was not otherwise subject to" that agreement's terms, based on the evidence before it. Defendants' arguments all hinge upon Plaintiff's discovery responses, stating he was a general partner of New Era or agent of Michaels during the relevant time periods. We note that the briefing and record in this case are singularly lacking in any useful information about the nature and scope of New Era's actual or legitimate partnership business, for purposes of attributing various powers or claims to the partnership, as opposed to outlining any of the activities of its general partners or agents. There is no written partnership agreement on file. Although the complaint references that monies were provided to Defendants for "shelter," by Plaintiff or by New Era, the specific lease transaction referenced in the

settlement agreement is not mentioned in the complaint. We next turn to the statutory scheme governing partnerships to determine whether, as a matter of law, Plaintiff is bound by Michaels' settlement agreement's arbitration clause.

A. Partnership and Agency Rules

The Uniform Partnership Act, Corporations Code sections 16100 et seq., governs many aspects of the rights and duties of partners and persons dealing with partnerships. Under Corporations Code section 16202, subdivision (a), "the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership." (*In re Marriage of Geraci* (2006) 144 Cal.App.4th 1278, 1292.)

A partner is generally considered to be an agent of the partnership, who has apparent authority to bind the partnership in ordinary partnership transactions. (9 Witkin, Summary of Cal. Law (10th ed.) Partnership, § 35, pp. 609-610 [Partner as Agent].)[6] "The existence of agency or employment is mainly a question of fact." (3 Witkin, Summary of Cal. Law, *supra*, Agency, § 93, pp. 140-141.)

"Thus, each partner is an agent of the partnership for the purpose of partnership business. An act of a partner, including execution of an instrument in the partnership name for apparently carrying on in the ordinary course the partnership business, or business of the kind carried on by the partnership, binds the partnership. However, the partnership is not bound when (a) the partner had no authority to act for the partnership,

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6 This rule is limited if a filed statement of partnership authority provides for other means of exercising partnership powers (none here). (Corp. Code, §§ 16303, 16301.)

and (b) the person the partner was dealing with knew or had received notification that the partner lacked authority. ([Corp. Code, § 16301, subd.] (1); [citations]. In addition, when an act of a partner is not apparently for carrying on in the ordinary course the partnership business, the partnership is only bound if the act was authorized by the other partners. ([Corp. Code, § 16301, subd.] (2).)" (9 Witkin, Summary of Cal. Law, *supra*, Partnership, § 35, pp. 609-610; *Elias Real Estate, LLC v. Tseng* (2007) 156 Cal.App.4th 425, 433 [sale of real property was an act outside ordinary course of partnership's clothing business; thus, under Corp. Code, § 16301, one partner's authority to sell property on behalf of absent partners had to be in writing, and because it was not, purchase agreement signed only by one partner was not enforceable against nonsignatory partners].)

It is not clear exactly what were the "ordinary partnership transactions" of New Era. " 'The question of the existence of a partnership depends primarily upon the intention of the parties ascertained from the terms of the agreement and from the surrounding circumstances. [Citations.] Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in the profits and losses and in the management of the business. [Citations.] . . . It is the intention as evidenced by the terms of the agreement, and not the subjective or undisclosed intention of the parties, that controls. . . . "It is the intent to do the things which constitute a partnership that usually determines whether or not that relation exists between the parties. [Citation.]" ' " (*In re Marriage of Geraci, supra,* 144 Cal.App.4th 1278, 1292-1293.) Objective standards are used for determining what the parties agreed upon, for purposes of

determining the terms and scope of their agreement. (Civ. Code, §§ 1550, 1565, 1580; *Weddington, supra*, 60 Cal.App.4th at p. 811; *Brant v. California Dairies* (1935) 4 Cal.2d 128, 133.)

In *Keller,* a sole general partner of a limited partnership contended he, a nonparty, was not bound by an arbitration agreement entered into between his partnership and a third party (a construction company). (*Keller, supra*, 220 Cal.App.3d 222, 225.) The court held he was nevertheless subject to the arbitration agreement, because under the circumstances, there was enough of a relationship with the parties to the arbitration agreement so that he must be held subject to it as well, even though he personally never agreed to arbitrate the dispute. The court relied on California statutory law providing that a general partner of a partnership is liable for " 'all . . . debts and obligations of the partnership . . . .' " (*Id.* at p. 228, citing former Corp. Code, § 15015, subd. (b), now Corp. Code, § 16306). "In sum, the relationship between a sole general partner and a limited partnership is such that the partner is bound by an agreement to arbitrate disputes entered into by the partnership." (*Keller, supra*, 220 Cal.App.3d 222, 228.)

In *Smith, supra*, 153 Cal.App.4th 892, 896-897, this court acknowledged the rule that nonsignatories to an arbitration agreement may be required to arbitrate, where the circumstances show that " 'a preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement, makes it equitable to impose the duty to arbitrate upon the nonsignatory. [Citation.]' " (*Ibid.*) There, we held the trial court correctly denied a defendant school's petition to arbitrate the plaintiff student's statutory claims, where the subject arbitration clause

appeared in a student loan agreement that did not have anything to do with the school's business or academics. Specifically, "[t]he arbitration provisions of a student loan agreement do not apply to claims against a school which are entirely unrelated to the terms or enforceability of the loan." (*Id.* at p. 892.) "[T]here is nothing in the record which suggests that in providing the vocational training which is the subject of Smith's complaint, [school] acted as [lender's] agent such that there is any equitable reason to give [school] the benefit of the arbitration clause in the [lender's] notes." (*Id.* at p. 897.)

B. Application of Rules

It is error for a trial court to deny a motion to compel arbitration solely on the basis of the complaint's allegations, where evidence can be presented to allow a factual determination to be made about the existence of any binding arbitration agreement. (*Hotels Nevada, supra*, 144 Cal.App.4th 754, 761-762.) Here, however, the trial court appropriately considered extensive evidence that was presented both in support and in opposition to the motion to compel arbitration, for purposes of clarifying the evident intentions of the parties regarding the breadth and applicability of the arbitration provision relied on by Defendants, as well as its legal effect. The trial court was presented with factual and legal questions about the nature and extent of any "preexisting confidential relationship, such as an agency relationship between the nonsignatory and one of the parties to the arbitration agreement," between Plaintiff and Michaels. (*Smith, supra*, 153 Cal.App.4th 892, 896-897.)

Under the rules set forth above, Plaintiff as a nonsignatory should only be deemed to be bound by the arbitration clause in the settlement agreement if "there is any equitable

reason to give [Defendants] the benefit of the arbitration clause in the [settlement agreement]." (*Smith, supra*, 153 Cal.App.4th 892, 897.) There would arguably be equitable reasons to do so, if the allegations of the complaint were clearly confined to seeking recovery of partnership assets or enforcing partnership obligations. However, some of the allegations of the complaint raise claims against Defendants that are, for purposes of these pleadings, entirely unrelated to the terms or enforceability of the settlement agreement. The arbitration provisions of the settlement agreement do not clearly apply to any claims alleged by Plaintiff that were exclusive of the activities of New Era or Michaels.

In other words, Plaintiff's complaint has alleged that in some of the transactions, he acted individually and not always on behalf of New Era, and as a factual matter, there is no way of conclusively determining those issues in the context of the petition to compel arbitration. We reject Defendants' contention that admissions by Plaintiff that he acted as an agent of Michaels, as well as a general partner of New Era, are enough, as a matter of law, for Plaintiff to be bound as a nonsignatory to the arbitration agreement found in the settlement agreement that Michaels reached. The trial court had before it evidence that before the settlement, Michaels obtained a different attorney than he and Plaintiff had previously consulted before reaching the settlement, and Michaels did not disclose the existence or terms of the settlement agreement to Plaintiff. Michaels did not show that Plaintiff was a party to the subject lease agreement, which he had previously refused to disclose even to Defendants, as recited in the settlement. The trial court could reasonably infer from such evidence that Plaintiff was a stranger to Michaels' settlement

with Defendants. Plaintiff's declaration stated that Michaels represented to him that he was not settling Plaintiff's disputes, and the court could readily infer from that showing that Michaels had not demonstrated that he was acting predominantly on behalf of New Era at the time of the settlement, in such a manner as to have apparent authority to bind Plaintiff to the settlement terms, whether as another partner or as an agent. (See *Saathoff, supra,* 35 Cal.App.4th at pp. 700-701.)

Substantial evidence supports the trial court's finding that the subject of the arbitration clause and the subject of the complaint are not so closely related that it would be equitable to compel Plaintiff to arbitrate some or all of the issues raised in the complaint. (*Smith, supra*, 153 Cal.App.4th 892, 897.)

IV

MOTION FOR ATTORNEY FEES

A. Background and Ruling

Following the trial court's denial of Defendants' motion to compel arbitration, Plaintiff filed a motion for attorney fees, arguing he was the "prevailing party" for purposes of the motion to compel arbitration, and that he was entitled to an award of $47,815 in attorney fees pursuant to Civil Code section 1717. Billing records were submitted.

Defendants opposed the motion as premature, and claimed the subject settlement agreement did not provide for attorney fees for prevailing on or opposing a petition to compel arbitration. They also argued the monetary amount sought was excessive.

During oral argument on the motion for attorney fees, Defendants asserted that the action on the settlement agreement had not concluded, regarding whether the releases in the agreement had any effect as to Plaintiff. Defendants further claimed that only an arbitrator had the power to grant attorney fees to the prevailing party. Plaintiff responded that since he was not a party to the settlement agreement, there were no remaining issues under that agreement to adjudicate.

In its order granting in part Plaintiff's motion for an attorney fees award, the court expressly rejected the argument that the fees request was premature, under the authority of *Otay, supra,* 158 Cal.App.4th 796. The court explained: "In this regard, the Court notes that it believes its ruling denying the arbitration motion based on the finding that Plaintiff was not a party to the subject agreement is a final resolution between these parties of any claims arising out of the settlement agreement. [¶] The Court also rejects Defendants' arguments that the settlement agreement's terms do not support an award of attorneys' fees to Plaintiff for having prevailed on the arbitration motion. [Citation.]"

However, the court evaluated the amount sought as being unreasonable, and made an award of $24,570. Defendants appealed.

B. Applicable Law and Analysis

In *Otay, supra,* 158 Cal.App.4th 796, this court addressed the issue of when the denial of a party's petition to compel arbitration should amount to a final resolution between the parties of any of their potential contractual claims. That case arose in a procedural context in which there were two primary contracts between the parties, as well as a separate "Coordination Agreement." Under the Coordination Agreement, binding

arbitration provisions were incorporated as required by one of the primary contracts, which contained a binding arbitration clause, and it therefore served to preclude further litigation on that matter. (The other primary contract was not written to preclude further litigation through providing such an alternate dispute resolution method; *id*. at pp. 805-808.)

After disputes arose over the transactions, one of the parties sought to compel arbitration, but was unsuccessful. On appeal, we decided that in the procedural context of the "discrete legal proceeding" that was before the trial court (the petition to compel arbitration), contractual attorney fees principles would allow the prevailing party on the arbitration petition issues (alone) to be awarded fees. That party had effectively defeated the petition to compel arbitration, and it had thereby obtained "a ' "simple, unqualified win" ' on the only contract claim at issue in the action--whether to compel arbitration under the Coordination Agreement. [Citations, including *Hsu v. Abbara* (1995) 9 Cal. 4th 863, 876.] Accordingly, [it] was the prevailing party as a matter of law because it defeated the only contract claim before the trial court in this discrete special proceeding. [Citation.]" (*Otay, supra*, 158 Cal.App.4th at p. 807.)

In *Otay,* we rejected a contention that the prevailing party on the arbitration issue had obtained merely "an interim procedural victory," when the overall merits of the various contracts remained to be determined and future litigation was anticipated. Rather, the petition to compel arbitration was deemed to be severable from the remaining contract issues, for purposes of awarding contractual attorney fees on the petition proceedings. (*Otay, supra,* 158 Cal.App.4th at pp. 807-808.) We supported our

conclusions by relying on other case authority discussing when contractual attorney fees may be awarded to a prevailing party that obtained an appealable order or judgment in a discrete legal proceeding, even though other related litigation on the merits had not been finally concluded (citing, e.g., *In re Estate of Drummond* (2007) 149 Cal.App.4th 46, 52-53 (*Drummond*)). Where, in the context of a petition to compel arbitration, a party obtains a favorable order that amounts to a "final resolution of a discrete legal proceeding," an attorney fees award for that prevailing party may be appropriate, since that party has separately prevailed on a fully resolved contractual issue. (*Otay, supra,* 158 Cal.App.4th at pp. 807-808.)

As part of our holding in *Otay* that the attorney fees order was appealable, we took note that "an order denying arbitration is final and appealable even though more litigation is contemplated in a separate action. [Citation.]" (*Otay, supra*, 158 Cal.App.4th 796, 803.) We viewed that petition to compel arbitration under the Coordination Agreement as an "action on the contract" for purposes of Civil Code section 1717, "in this discrete special proceeding. [Citation.]" (*Otay, supra,* at p. 807.) The denial of the petition did not amount to "only an interim procedural victory," in part because the petition itself was the only operative pleading in that case. (*Ibid*.)

In *Otay*, we distinguished other cases which appear to hold that "a procedural victory does not qualify as the type of win for a mandatory attorney fee award," because "these cases did not involve the final resolution of a discrete legal proceeding." (*Otay, supra,* 158 Cal.App.4th 796, 807.) In *Otay*, there were no other contractual issues left for the trial court to resolve regarding the matter brought before it. (*Id.* at p. 808.)

The court in *Drummond, supra,* 149 Cal.App.4th 46, 52 had to define the term, "final resolution of the contract claims," in a procedural context in which the party claiming fees had obtained only an interim victory (obtaining dismissal without prejudice of the other side's claims, that were being pursued in the wrong forum). Such a dismissal and ultimate transfer amounted to the sustaining of a plea in abatement on grounds of "another action pending," rather than a "final termination of a special proceeding." (*Id.* at pp. 51-53.) No award of attorney fees was allowed in that context, since the merits of the subject issues remained to be resolved.

In *Drummond, supra,* 149 Cal.App.4th 46, the appellate court relied on *Hsu v. Abbara, supra*, 9 Cal. 4th 863, 877, for the concept "that status as the 'party prevailing on the contract' is ascertained not by technicalities of pleading and procedure but by a pragmatic assessment of the parties' ultimate positions vis-à-vis their litigation objectives as reflected in pleadings, prayers, and arguments. [Citation.]" (*Drummond, supra,* at p. 51.) "[T]he phrase 'prevailing on the contract,' . . . implies a strategic victory at the end of the day, not a tactical victory in a preliminary engagement." (*Ibid.*)

In this type of contractual attorney fees case, it is essential to take into account the procedural background of the motion for an award of fees, for purposes of determining whether a final resolution of the subject contract claims has been achieved. Thus, it is not a victory "on the contract" where a party only achieves a change of forum or venue. (*Drummond, supra*, 149 Cal.App.4th 46, 52-53.)

In the case before us, the record does not include Defendants' answer to the complaint, nor any indication of whether the proceedings on the merits in the trial court

were all being stayed pending this appeal. As already noted, the record does not show whether there is any independent or related litigation pending between Plaintiff, Michaels and/or New Era. We cannot assume that any ultimate resolution on the merits of the Plaintiff's complaint may not include any issues about the nature of the New Era partnership agreement and the relationship of its general partners and/or agents, with respect to any alleged obligations of Defendants. The proceeding brought before us, and the trial court, was essentially only an interim procedural step in the interpretation of the settlement agreement and any binding effect it may have, with respect to Plaintiff. In this procedural context, under these authorities, we do not believe that the trial court had an adequate basis to make an award of contractual attorney fees.

We need not reach any issues about which of the two attorney fees clauses in the settlement agreement may have any ultimate application to the various disputes displayed in this record. We are deciding only that the denial of this petition to arbitrate, in what was essentially a motion proceeding within a larger dispute pled by the complaint, did not amount to a contractual victory for Plaintiff on the settlement agreement or any of its component parts. (Civ. Code, § 1717.)

DISPOSITION

The order denying the petition to compel arbitration is affirmed. The order awarding attorney fees is reversed with directions to enter a new order denying an award of attorney fees, without prejudice to any future determination of prevailing party status

at an appropriate time, if that becomes necessary. All parties are to bear their own costs on appeal.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.